UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THOMAS F. DAY, Appellant, v. DEPARTMENT OF HOMELAND SECURITY, Agency	DOCKET NUMBER DC-1221-12-0528-W-1 February 28, 2013

AMICUS BRIEF ON BEHALF OF BROWN CENTER FOR PUBLIC POLICY AKA WHISTLEWATCH.ORG AS AMICI CURIAE

BRIEF OF AMICUS

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OPENING STATEMENT

The Whistleblower Protection Enhancement Act (WPEA) should be applied retroactively to provide the protections that are desperately needed by Federal Government Whistleblowers. Since Congress intended the Act to be clarifying, it is presumptively retroactive. *Public Law 112.122, Stat. 1376.*

IDENTITY OF THE AMICUS

Amicus, the Brown Center for Public Policy, also known as (a/k/a) Whistlewatch.org, is a Not For Profit, Public Benefit 501(c)(3) corporation, incorporated in the State of California. We engage in advocacy, education, journalism and litigation on behalf of whistleblowers and tax payers. WhistleWatch.org qualifies as a representative of the news media under 5 U.S.C. § 552(a)(4)(A)(ii)(II) and is exempt from fees for Freedom of Information Act (FOIA) requests because we disclose information on government performance, oversight responsibilities and costs in the public interest. Further, Whistlewatch.org converts the information received and conducts independent research then publicizes distinct Internet publications and provides information to fellow colleagues in the public policy community including the Make It Safe Campaign & Coalition (MISC). We are a member affiliate of MISC.

The Chief Executive Officer, Evelynn Brown, J.D., LL.M, is a former federal employee of the Department of Health and Human Services (HHS), well known whistleblower and globally recognized expert. Ms. Brown suffered whistleblower retaliation in the wake of making protected disclosures and was subjected to the *Huffman* decision by the Office of Special Counsel (OSC) in 2008. *Huffman v. Office of Personnel Management,* 263 F.3d 1341 (Fed. Cir 2001). *(See Exhibit A).*

The statutory reversal of *Huffman* is clearly intended and well articulated by Congress within the plain language of the WPEA. The retroactive application of the WPEA to pending cases is the issue now before the court. Whistlewatch.org advocates for the immediate retroactive application of the WPEA to all pending cases and all cases and/or claims that may be adjudicated before all bodies with judicial capacity, in the interests of justice.

INTERESTS OF AMICI CURIAE

Whistlewatch.org has a vested interest in these proceedings because the organization was founded to prevent injustice in the employment law arena for government and industry workers. Our team of ethics and legal professionals take referral cases including those involving federal employees before the Office of Special Counsel, hereafter OSC and Merit System Protection Board, hereafter, MSPB. Our role and obligation is also to educate the public on issues related to employment law violations and the costs to tax payers of gross waste when discrimination and whistleblower retaliation occurs. These financial aspects are of national importance and cannot be underestimated considering the weakened state of the U.S. economy.

During 2011-2013, Whistlewatch.org conducted a massive FOIA process to all cabinet level agencies. What was revealed in the information we received was very disturbing. *Inter alia* 2 top level agencies with missions to protect the public, the Department of Health and Human Services (HHS) and Housing and Urban Development (HUD) had not completed annual reports to Congress, under Section 203 of The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, a/k/a No Fear Act, that seeks to discourage federal managers from engaging in unlawful discrimination and whistleblower retaliation. *Public Law 107–174.* Of note, HHS had not completed any annual reports for 10 years, the entire time the law had been in effect. Ms. Brown made a disclosure to the OSC concerning this matter. On January 25, 2013, OSC issued a letter to Brown that there was a "substantial

likelihood" that the information disclosed was a "violation of law, rule or regulation." An ongoing investigation exists. However, no response to the letter from OSC to HHS has been received to date. *(Exhibit B).*

Retaliation for whistle blowing and related Equal Employment Opportunity Commission (EEOC) discrimination is a total waste of tax payer money, particularly when the federal government is mandated to be a model employer for industry. Federal employees who report wrongdoing within the government are brave individuals who speak up to protect the public. Their reward is punishment: to become the subject of prohibited personnel practices pursuant to 5 U.S. C. 2302, which include locking the whistleblower in the vacuum of workplace isolation chambers when they report violations of law, rule and regulations. Federal management then demotes and/or strips the employee from their duties and in many cases, forces the whistleblowers out of federal service using trumped up or manufactured charges, all carefully crafted in order to hide the underlying whistleblower disclosures.

The definition of what is a protected disclosure was constricted to the point of non-existence in the *Huffman* decision, which eliminates all protection to federal employees who learn of and report wrongdoing during the ordinary course of their work. These misguided decisions, which are contrary to the intent of Congress gives safe harbor to those who commit wrongful misconduct, undermining protections of the public.

Government employed workers, including federal service employees, take an oath swearing them into duty. Executive branch employees are subject to the Standards of Ethical Conduct with duties that require them to disclose "any information" that they reasonably believe evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety, unless such disclose is specifically prohibited by law. *5U.S.C 2302(b)(8).* Fulfilling that duty is

reiterated by sobering reminders from the highest ranking law enforcement agency, the Department of Justice (DOJ). (*http://www.justice.gov/archive/transition/merit-sys-principles.htm*) The stated concern with the conflict between the duty and the complete lack of full protections against retaliation is now at issue.

STATEMENT OF THE ISSUE

The issue before the Board is the retroactive application of the Whistleblowers Protection Enhancement Act, signed into law on November 27, 2012, hereafter, WPEA currently before the Board. *Federal Register, Vol. 78, No. 27, Feb. 8, 2013.* More specifically, the issue is whether the Act and its strengthened provisions applies to claims filed, cases in process and appeals pending or filed as of the effective date of the Act, December 28, 2012.

Whistlewatch, as a public benefit corporation and public policy institute provides information and guidance to whistleblowers. In its amicus curiae role, Whistlewatch.org urges the Board to adopt a retroactive application of the WPEA, to all claims, appeals and enforcement actions pending, prior to the effective date as intended by the will of Congress.

LEGISLATIVE BACKGROUND & HISTORY

The WPA was a broken and lame law because of the countless incorrect adaptations and interpretations by the MSPB and the Federal Circuit judicial system. The clarified protections in the WPEA finally provide basic remedial protections for a federal government whistleblower and clarification that fraud and misconduct observed in the normal course of employment has always been protected whistleblower activity, not the random and infrequent observations of fraud and misconduct NOT observed in the line of duty. The WPEA is a long overdue ***clarification*** of the

Whistleblower Protection Act, hereafter, WPA. By virtue of the wording of the WPEA, it was the will of Congress to provide a critical amendment to enhance the WPA.

By protecting only incidental observations, the WPA as interpreted by the courts, protected almost no meaningful disclosure activity, allowing whistleblowers to be crushed, their careers destroyed, for doing the right thing and allowing the involved agency to continue gross fraud, gross waste, gross mismanagement, abuse of authority and substantial and specific dangers to public health and safety. Failure to correct said disclosures by federal officials in positions of power could be grounds for criminal conspiracy and gross misconduct.

Moreover, court decisions failed to include the true "consequential" damages for the severe and well understood emotional distress and humiliation that a whistleblower experiences, which further encourages retaliation by the involved agencies. This misinterpretation by the courts was based on a novel definition of "consequential" damages that failed to include all the damages that consequently resulted from agency retaliation. The fact that the WPA was broken was well known to virtually everyone concerned with government fraud, but nothing could be done to remedy the dysfunctional system for political reasons. The original decisions under the Act seemed to accept and honor the legislative purpose. See, *Marano v Department of Justice*, 2 F 3d 1137, 1138 (Fed Cir 1993).

These decisions were quickly eroded by others that confused employee wrongful conduct with employer wrongful conduct and twisted the Act's protections. *Watson v. Department of Justice,* 64 F.3d 1524, 1527 n. 3 (Fed.Cir.1995) *(citing cases for the proposition that whistle blowing does not shield employees who engage in wrongful conduct because they have blown the whistle).* This trend continued until 2001 when *Huffman* obliterated all protections by defining a protected disclosure so narrowly that it was more than likely never to occur.

Many unsuccessful attempts were made to enact amendments to the WPA to address the primary issues of failing to provide a realistic recovery for a whistleblower willing to risk his or her career or report something observed during the normal course of work and when reporting such disclosures directly to supervisors. Congress after Congress and Administration after Administration sponsored and promised to pass amendments similar to the WPEA. From 2004 until 2010, every attempt to achieve final passage was sabotaged at the final step by the exercise of a Senatorial fiat; an anonymous override at the last minute. The delay in enacting the WPEA is tragic with many whistleblowers having been wrongfully removed from federal service in the interim. It is clear that the proposed amendments and enhancements to past legislation are not new or novel, since the provisions were anticipated for well over a decade.

The Board has the opportunity before it now to recognize what the Congress made clear in the **preamble** to the WPEA. Specifically, **the WPEA is an amendment to and a *clarification* of the WPA...**

> ***"To amend chapter 23 of title 5, United States Code, <u>to clarify</u> the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes".***

Given the plain language meaning, as applied the WPEA is Congressional intent to correct the law to override decisions that were wrongfully interpreted, decided and applied by the courts.

Furthermore, the WPEA expressly provided that it is intended **<u>to clarify</u>** and correct the misguided court rulings and is thus to be effective to all pending matters. The ***clarification*** is to

provide the justice and relief so long denied the heroic whistleblower, in the arena where such heroes are most needed, at the largest employer on earth, the federal government.

If the need for whistle blowing and self-policing of the government was not a recognized need over a century ago, Abraham Lincoln would likely not have invented the Qui Tam claim and the False Claims Act. From 1986 when the original act was amended, through 2008, the United States has recovered over 22 billion dollars. (*http://www.taf.org/FCA-stats-DoJ-2008.pdf , for comprehensive information regarding FCA statistics. Information about individual cases may be found at http://www.taf.org/statistics.htm).*

ARGUMENT

A. The 14 Principles of Ethical Conduct for Federal Employees are Sacrosanct

An overarching public policy argument can be made that the question of whether retroactivity should apply to cases pending before the Board has already been answered by virtue of the fact that federal employees take an oath and must abide by a code of ethical conduct while in public service. We refer the Board to the 14 Principles of Ethical Conduct. *(Executive Order 12674, as amended by Executive Order 12731, and a number of ethics-related statutes, & Exhibit C).*

Two of the Principles directly apply to this argument:

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

And

(11) **Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.** *(Emphasis added)*

Additionally, according to legal definition, the word "shall" is a mandatory imperative:

> "In common, or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always, or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears; but the context ought to be very strongly persuasive before it is softened into a mere permission," *People v. O'Rourke, 124 Cal. App. 752, 759 (Cal. App. 1932)*

The word "shall" as an imperative command to a person who has a duty such as a federal employee requires the person to act. Combining the Ethical Principles with the legal meaning of the word "shall" federal employees are legally mandated to blow the whistle on waste, fraud, abuse and corruption or risk being prosecuted for not performing their duties. There can be no "softening" of the word "shall" because to act is not discretionary.

We doubt that any person in their right mind would dispute the fact that it is the duty of every federal employee to report wrongdoing as outlined in the Ethical Conduct Principles. No exception to the rule exists nor can any reasonable argument be made that the federal employee "may" or "might" be required to act. Federal employees are the gate-keepers over tax payer's money and provide direct oversight of industry. The command that federal employees **shall** report fraud, waste, abuse and corruption shows the duty is mandatory.

The argument under *Huffman* that disclosures made during the normal course of duties and to supervisors are not protected disclosures, flies in the face of the Ethical Conduct Principles. It's a nonsensical way of reasoning to protect management from failing to perform their legally duties, providing a dirty cover-up blanket thus subjecting the whistleblower to unfettered retaliation. Simply put, if a federal employee does not learn of violations of law, rule

and regulation during the "normal course of their duties" how else do they find out about wrongdoing? This goes to the very core of government service. If a federal employee can't tell anyone about wrongdoing learned during their work, are they supposed to report fraud, waste, abuse and corruption in areas they know nothing about? Would it be appropriate for a program officer at HHS to report fraud at the Securities and Exchange Commission (SEC)? Yes, if they had reasonable beliefs that violations of law were occurring. However, it is much more reasonable, understandable and likely that a HHS program officer would learn that a grantee was committing fraud by not providing services paid for by HHS. Thus, this involves their normal work duties making the disclosures protected erecting a prohibited personnel practice shield.

The MSPB is fully aware that the WPEA was ready to be implemented over a decade ago. Federal whistleblowers needed enhanced protection. The public also needed better protection from fraud and misconduct which directly flows from how well federal service employees treated. The public recognized the need for the WPEA through their elected Congressional representatives and eagerly anticipated implementation. However, each time the WPEA was about to be made effective, a dark hand from the Senate reached out to block passage. The hard work to obtain implementation began over again each year by rights advocates and good government groups. In a very real sense, the new provisions of the WPEA have long been in existence for many years under the WPA, but were ignored by the MSPB which in effect, caused immense harm to federal and industry whistleblowers and directly to the public.

How whistleblowers and the public is directly harmed is set out here and we request the Board take notice of the interpretation of what is a protected disclosure and when a decision is made in favor of the whistleblower by the MSPB, including damages that flow from the harm. We cite for the Board a pending case before the Dallas, Texas Regional Office, *Barbara R. King*

v Department of the Air Force, DA 0752-09-0604-B-1, wherein the question of the retroactive application of the compensatory damages provision is at issue, pursuant to 5 USC Section 1221, (g) (1) (A) (ii). (*News article can be found at this site http://whistlewatch.org/2012/11/federal-employee-barbara-r-king-wins-whistleblower-retaliation-case-against-air-force/*)

KING CASE BACKGROUND

The *King* case, supra involved a female veteran of the armed military forces who worked as a civilian federal service employee of the Air Force as the Sexual Assault Prevention & Response Program Manager, at Sheppard Air Force Base in Texas. *King* made protected whistleblower disclosures of a failed program that was not protecting victims. Rather than act on the protected disclosures to correct problems in the program, Ms. King became a victim herself of sex and age discrimination and whistleblower retaliation. In the wake of those disclosures, Appellant suffered severe retaliation including a stripping of her duties and a demotion in order to cover-up the wrongdoing, which she reported up the chain of command and to the OSC. Ms. King's whistleblower disclosures were made during the normal course of work.

The *King* case spanned over several years with her having first sought protection at the OSC, all to no avail. Then the MSPB dismissed the Appellant's first appeal as premature, sending her off to the full Board, adding to the delay for relief. The Board reversed and re-opened the appeal.

During the long drawn out proceedings Appellant suffered significant emotional damage and financial loss, including a Veteran's home loan because she was forced to move from one location to the next at lesser paying jobs in order to feed her family. The financial losses Appellant incurred are directly attributed to the ongoing prohibited personnel practices.

Ms. King is a heroic individual who served our country gallantly with a follow on exemplary federal service employment work record who suddenly found herself financially devastated, battling a giant, the Department of Defense (DOD) Air Force, with unlimited tax payer funds at their disposal. The courage of Appellant is legendary that despite all odds and personal loss, she would make known her original disclosures to the world that women in the armed forces were being sexually abused and she'd fight for her employment property rights.

A final decision was issued in the *King* case, in Appellant's favor, thereby making her the prevailing party, with a finding against her employer for prohibited personnel practices under 5 U.S.C. 2302. That decision was made by Administrative Judge (AJ) Marie A. Malouf on October 3, 2012. However, the decision was not allowed to be made public by the parties until November 7, 2012, when it became final. Less than one week later on November 13, 2012, Congress passed the WPEA, effectively making it the law of the land. President Obama signed the Bill on November 27, 2012.

In the *King* case, supra, the AJ rejected retroactive application of the WPEA as to Appellant's entitlement to an award of compensatory damages. (*Summary of Conference re Damages, Exhibit D).* The reasoning of the AJ is confounding since a prevailing party to virtually any civil suit would afford entitlement recovery of costs and damages. But for a week or two of an over 4 year long battle to regain her employment status, *King* is being now told by the AJ, "too bad, so sad" you are out all the money you lost over the years while enduring egregious gender, age discrimination and whistleblower retaliation.

We argue that it would be a travesty of justice to deny *King* full recovery of all damages directly related to violations of law, rule and regulation and any and all attorney fees related unless the AJ intends to create a lesser class of citizens by denying them equal rights protection

for discrimination and whistleblower retaliation. A decision like this would hold *King* and others must finance all litigation to assert due process of law and property rights, YET, federal agencies who wrongly abuse their authority will have all costs paid by tax payers.

The very concept that a person damaged by another civilly must pay out of pocket for litigation and pay the salaries of the people who intentionally harmed them, through their tax dollars and then absorb all the related costs that flow, spins the concept of equity and fundamental fairness into little more than shiny balls on the MSPB justice tree.

We further argue that the tax payers should be made aware of this contorted concept of twisted justice who will not be pleased to find out they are footing the bill for actions taken by federal agencies that never should have happened and could have been halted at any time by OSC and MSPB, years earlier. We wager that the cost to the tax payers for the *King* case alone exceeds $5 Million since several agencies and their employees have been involved in the case.

Meanwhile Appellant having been victimized lost her Veteran financed home, numerous professional opportunities and hundreds of thousands of dollars for blowing the whistle in order to protect sex assault victims. By virtue of Mr. King's job title, she learned of the disclosures during the normal course of her work duties. The case was decided in her favor. Therefore, as the prevailing party, she must be entitled to all damages related and any costs that flow.

Nevertheless, the AJ held that retroactive application of a statute that provides new legal consequences, including increased liability, for acts completed before the statute's announced effective date of the WPEA is disfavored absent clear legislative intent. The AJ then determined that the legislative history of the WPEA is "ambiguous" adopting a presumption that Congress had rejected retroactive application of the WPEA.

This AJ decision was made knowing the Board was requesting amicus to be filed on the very issue involved in the *King* case. It is extremely worrisome that the AJ knowing that the WPEA was on its way to passage by Congress would in a hurry rule on the *King* case when years had passed while the case languished at the MSPB. It appears there was a conscience effort to prevent *King* from being compensated for all that she had lost. We question the reasoning that but for a couple weeks in a 4+ year battle, the AJ decided the Appellant should die financially because it is easier to bury the costs of the case to Ms. King with the dead WPA, thereby cutting the Air Force a financial break while the WPEA was moments away from being born.

We argue emphatically if Appellants are not entitled to receive full compensation for their losses and only back pay, such as in the instant case of *King* receiving less than $40,000, in back pay verses suffering long years of the cascading effects of retaliation, why would any federal employee bother to blow the whistle to honor their ethical conduct duties. The Board must answer this question. We request a decision forthwith to settle the dispute that has arisen in the instant case of *King*.

B. CONGRESS INTENDED THE WPEA TO BE RETROACTIVE

The express language of the WPEA controls and makes clear it is ***clarifying*** in its purpose and intent to be retroactive in its application. Therefore, AJ Malouf's decision is without merit. Both the history of the WPA and the long march to amend that act as decisions from the courts were handed down contrary to its express provisions underscore the clarifying nature of the WPEA. As the dark history of failed decisions under the WPA became dead wood, a new justice tree sprung that is the WPEA. An amendatory act, implemented to clarify and correct incorrect and improper interpretations by the MSPB and the Federal Circuit Court.

Further, the WPEA announces its clarifying purpose in its preamble; enacted to, *"amend Chapter 23 of Title 5 of the United States Code, to **clarify** the disclosures of information.....and for other purposes"*.

Specifically and most critically on point is the illogical and erroneously decided *Huffman* decision and that it should be finally reversed because the original intent of Congress in enacting the WPA restored in the WPEA is articulated in this subsection:

(f)(1) A disclosure shall not be excluded from subsection (b)(8) because--
(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);
(B) the disclosure revealed information that had been previously disclosed;
(C) of the employee's or applicant's motive for making the disclosure;
(D) the disclosure was not made in writing;
(E) the disclosure was made while the employee was off duty; or
(F) of the amount of time which has passed since the occurrence of the events described in the disclosure.

*(2) **If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8)** if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure. (Emphasis added).*

The impetus for clarifying the WPA had its roots in the misinterpretation of the WPA as announced in the abominable appellate decision in *Huffman v. Office of Personnel Management*, 263 F.3rd 1341 (Fed Cir 2001). In that case, the court exploited ambiguities in the language of the WPA to conclude that disclosures observed during the ordinary course of employment were not protected. This decision, consistently followed by the Federal Circuit, with exclusive jurisdiction, turned the purpose of the WPA on its proverbial head, which generated the momentum necessary to cause Congress to clarify, enhance and enact the new law.

It is well settled that clarifying amendments to statutes, and even to Federal sentencing guidelines which increase consequences for previous conduct, are afforded retroactive application as a matter of course. *US v Morgan,* 376 F. 3d 1002 (9th Cir) [sentencing guideline modification is clarifying]; *Piamba Cortes v American Airlines, Inc.* 177 F 3d 1272 (11th 1999) [amendment clarifies prior law and reconciles aberrant court decisions]; *Leshinsky v Televent GIT, S.A.,* 873 F. Supp 2d 582 (DC NY 2012) [amendment to SOX Whistleblower statute is retroactive as it corrects and clarifies court decisions].

When the legislative action announces it is clarifying an ambiguity in the original statutory language, retroactive application is presumed. See, *In re Park Dash Point LP*, 152 BR 300 (WD Wash. 1991) and *Department of Substances Control v Interstate Non-Ferrous Corp.* 99 F. Supp. 2d 1123 (ED Cal 2000) [new liability scheme of fines given retroactive application to vindicate purpose of intent of statutory amendment as announced]. Moreover, when the amendment deals with employment and the protection of individual rights and only impacts a government agency and not an individual, retroactive application is favored. *Lussier v Dugger*, 904 F. 2d 661 (11th Cir 1990).

Similarly, with regard to the definition of consequential damages, the term was interpreted to exclude pain and suffering and emotional distress damages. Instead of the common meaning of consequential damages, which includes pain and suffering and emotional distress, the court's applying the WPA referred to these damages as "compensatory damages" even though they are a consequence of the prohibited action. *Bohac v Department of Agriculture*, 239 F. 3d 1334 (Federal Circuit 2001), where the court strained to find a way to exclude emotional pain and suffering from the list of damages that were a consequence of the wrongful conduct. In almost all other jurisdictions, pain and suffering damages are included within the general

category and scope of "consequential" damages when they result from wrongful conduct. *Delaware River & Bay Authority v Kopacz,* 584 F 3d 622 (3rd Cir 2009).

The "unique" court decisions, such as *Bohac* and *Huffman*, misinterpreting the WPA, denying protected status for virtually all disclosures that would normally be made (during the course of duty) tortures the definition of "consequential" to avoid making an award for the incredible emotional distress endured by a whistle blower, were corrected and clarified by the WPEA, for damages especially by section 1221 (g) (1) (A) (ii).

The damages clarification or amendment simply adopts the language of the aberrant court decisions to make it clear that the court had improperly excluded from the definition of "consequential damages" was now included by using the language used by the court decisions to improperly exclude consideration of these damage awards. Therefore, the damage amendment of the WPEA is also clarifying and afforded retroactive application.

In determining whether the amendments are clarifying or a substantive change, the Board must look to the actual language of the Act. The WPEA expressly provides that its purpose is to ***clarify*** the WPA. It could hardly be clearer that the legislature intended to insure retroactive application by announcing that the Act was ***clarifying*** in the preamble.

Furthermore, in *Piamba, supra*, the court faced the issue of the retroactive application of an amendment to the Warsaw Convention as to damage limitations for personal injuries sustained by passengers in an airliner crash. The court recognized the seminal importance of the language of the amendment in announcing that it was merely clarifying the existing statute in the wake of court decisions that failed to recognize the intention of the original act:

Moreover, concerns about retroactive application are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law. See Beverly Community Hosp. Ass'n v. Belshe, 132 F.3d 1259, 1265 (9th Cir.1997), cert. denied, 525 U.S. 928, 119 S.Ct. 334, 142 L.Ed.2d 276 (1998); Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887, 890 (1st Cir.1992); Boddie v. American Broadcasting Cos., 881 F.2d 267, 269 (6th Cir.1989); cf. Tsui Yuan Tseng, 525 U.S. at ——, 119 S.Ct. at 667–68 (concluding that a provision in Montreal Protocol No. 4 limiting recovery for bodily injuries clarifies, but does not change, prior law under the Convention). ***In effect, the court applies the law as set forth in the amendment to the present proceeding because the amendment accurately restates the prior law. See Liquilux, 979 F.2d at 890 ("Clarification, effective ab initio, is a well-recognized principle.").***

*Several factors are relevant when determining if an amendment clarifies, rather than effects a substantive change to, prior law. A significant factor is whether a conflict or ambiguity existed with respect to the interpretation of the relevant provision when the amendment was enacted. If such an ambiguity existed, *1284 courts view this as an indication that a subsequent amendment is intended to clarify, rather than change, the existing law. See Liquilux, 979 F.2d at 890.* ***Second, courts may rely upon a declaration by the enacting body that its intent is to clarify the prior enactment. See id. Courts should examine such declarations carefully, however, especially if the declarations are found in the amendment's legislative history rather than the text of the amendment itself. See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n. 13, 100 S.Ct. 2051, 2061 n. 13, 64 L.Ed.2d 766 (1980).*** *As a general rule, "[a] mere statement in a conference report of [subsequent] legislation as to what the Committee believes an earlier statute meant is obviously less weighty" than a statement in the amendment itself. Id.; see also Pennsylvania Med. Soc'y v. Snider, 29 F.3d 886, 900 (3d Cir.1994) (attributing no value to a House committee report stating that an amendment clarifies prior law when the statement is inconsistent with a logical reading of the earlier version of the statute and with the legislative history of the earlier statute). Declarations in the subsequent legislative history nonetheless may be relevant to this analysis, especially if the legislative history is consistent with a reasonable interpretation of the prior enactment and its legislative history. See Sykes v. Columbus & Greenville Ry., 117 F.3d 287, 293–94 (5th Cir.1997) ("Although a committee report written with regard to a subsequent enactment is not legislative history with regard to a previously enacted statute, it is entitled to some consideration as a secondarily authoritative expression of expert opinion.") (quoting Bobsee Corp. v. United States, 411 F.2d 231, 237 n. 18 (5th*

Cir.1969)); SEC v. Clark, 915 F.2d 439, 451–52 (9th Cir.1990) ("While a statement concerning an earlier statute by members of a subsequent legislature is of course not conclusive evidence of the meaning of the earlier statute, the later interpretation may be accorded some deference where the subsequent legislative commentary accompanies the enactment of an amendment to the earlier law."); cf. GTE Sylvania, 447 U.S. at 118 n. 13, 100 S.Ct. at 2061 n. 13 (noting that such history is "sometimes considered relevant," but "subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment"). (Emphasis added)

CONCLUSION

For all the foresaid reasons, the WPEA is a ***clarification*** of the WPA. Through its passage and subsequent enactment, it corrects a series of aberrant court decisions. The AJ in *King, supra*, incorrectly looked to the committee notes and ignored the express language of the preamble and plain language wording of the statute, which is astoundingly clear. The AJ decision must be reversed and all costs and damages be awarded to Appellant.

There should be no doubt that Congress intended that the WPEA is *clarifying,* expressly provided for in the preamble. The Board cannot forsake *King* and others similarly situated. Federal agency management must be sent a resounding message. They will obey the law and stop all discrimination and whistleblower retaliation. They will become the model employers mandated by law. The tax payer gross waste must cease. The duty bound federal employees deserve no less than vindication that the public trust placed in them by the people is sacrosanct.

For the Board to rule that whistleblowers are not protected when they make disclosures during the course of normal of the public interest work would be to ignore the mandatory duties of each federal employee overriding the 14 Ethical Conduct Principles of federal service and the intent and will of Congress, as provided in the WPEA. Therefore, as to all cases pending and all

outstanding claims yet to be resolved, the WPEA must be applied retroactively with *Huffman* reversed on appeal.

Lastly, we extend our sincere thanks to the Board and the OSC for facilitating the solicitation of amicus briefs from interested parties and organizations.

Respectfully Submitted,

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AMICUS CURIAE BRIEF
WHISTLEWATCH.ORG
APRIL 25, 2008 OSC LETTER RE: *HUFFMAN*

EXHIBIT A

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APR 25 2008

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Re: OSC File No. MA-08-1078

Dear Ms. Brown-Remple:

This is in response to the above-referenced complaint that you submitted to this Office against officials of the U. S. Department of Health and Human Service. You allege that the decisions to reassign you on September 27, 2007, to issue you a new Performance Plan on January 27, 2008, resulting in a significant change in duties, responsibilities and working conditions, and to issue you a letter of reprimand on February 6, 2008, constitutes various prohibited personnel practices. You requested that the Special Counsel petition the Merit System Protection Board (the Board) for a stay of the letter of reprimand.

The U.S. Office of Special Counsel is authorized to investigate allegations of prohibited personnel practices and certain activities prohibited by civil service law, rule, or regulation. 5 U.S.C. §§ 1214(a)(1)(A), 1216(a) and 2302(b). The Special Counsel presents allegations of prohibited personnel practices, such as reprisal because of whistleblowing, to the Board who has the authority to review and adjudicate such claims.

Based on our evaluation of the facts and law applicable to the circumstances, as detailed in this letter, we have made a preliminary determination not to seek a stay and to close the investigation into this matter. Our factual and legal determinations are described below.

You allege that the decisions to reassign you on September 27, 2008, to issue you a new Performance Plan on January 27, 2008, and to issue you a letter of reprimand on February 6, 2008, constituted age and sex discrimination and reprisal for filing EEO discrimination complaints. The activities you described are prohibited personnel practices in violation of 5 U.S.C. §§ 2302(b)(1) and (b)(9). It is the policy of this Office, however, to defer such allegations to the equal employment process within your agency and the Equal Employment Opportunity Commission. You may pursue your discrimination and reprisal for such activity claim to that process. We will take no further action regarding this allegation.

You also allege that as reprisal for whistleblowing, you were reassigned on September 27, 2007, issued a new Performance Plan, resulting in a significant change in duties and responsibilities, on January 27, 2008, and issued a letter of reprimand on February 6, 2008. To support your allegation, you indicate you are a Program Officer, responsible for the complete monitoring process for all grantees due to be monitored, including site visits and report recommendations for correcting identified problems. Following a reassignment from Washington, DC Grants Policy to your current duty station, San Francisco, California, Runaway and Homeless Youth Programs in June 2007, you found fraud, waste, abuse and mismanagement of federal funds. Your report included, but was not limited to, information that children were living below minimum performance standard conditions; the agency had been funding programs many years that did not exist; grantees who were unlicensed to care for children were kicking them out on the streets in the morning; and grantees were not performing required fingerprint or background checks on employees. Between September 2007 and February 2008, you reported the improprieties to Central Office Management and attempted to work with Regional Staff. Subsequently, those officials advised you to contact officials of the Office of Inspector General. You characterized your whistleblowing activity as the Runaway and Homeless Programs report.

Under the Whistleblower Protection Act (WPA), it is a prohibited personnel practice to take or fail to take, or to threaten to take or fail to take, a personnel action with respect to any employee because of any disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8).

The elements of proof necessary to establish a violation of section 2302(b)(8) are: (1) a protected disclosure of information was made; (2) the accused official(s) (e.g., the proposing or deciding official) had knowledge of the disclosure and the identity of the employee making the disclosure; and (3) the protected disclosure was a contributing factor in the personnel action or threat of a personnel action.

Based on the available information, we are unable to conclude that your claimed whistleblowing activity is protected for purposes of the WPA. Specifically, as stated above your duties and responsibilities included filing monitoring reports and ensuring that the grants are processed in accordance with regulations. Thus, the assessment appears to be part of your normal duties and responsibilities. As such, by presenting the evaluation to your supervisors for their review, it appears that you did no more than carry out your required job responsibility. In addition, your managers advised you to present your findings to the Office of Inspector General. As such, it appears that you were simply complying with your supervisor's direction in the normal course of your duties. Under *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001), the

Federal Circuit determined that reports made as part of an employee's assigned normal job responsibilities are not protected disclosures covered by the WPA when made through normal job channels. Thus, in the absence of a protected disclosure, we have no basis for further inquiry into the actions you complain about as possible violations of section 2302(b)(8).

While the report to the Inspector General's Office, is not protected under section 2302(b)(8). We have considered it for a possible violation of 5 U.S.C. § 2302(b)(9)(C). Under that section, it is a prohibited personnel practice to take or fail to take, or to threaten to take or fail to take a personnel action against any employee or applicant for employment for cooperating with or disclosing information to the Inspector General of any agency. The elements of proof necessary to establish a case of a (b)(9) violation are: (1) employee or applicant for employment participated in the protected activity defined in 5 U.S.C. § 2302(b)(9); (2) the agency officials exercising personnel action authority had knowledge of the employee's or applicant's participation in the protected activity; and (3) participation in the protected activity was a significant factor in the personnel action or threat of a personnel action.

However, one of the elements required to demonstrate a violation of section 2302(b)(8) is that a personnel action is taken, not taken or threatened to be taken. Personnel actions are defined in 5 U.S.C. § 2302(a)(2)(A). We note that a reassignment is defined as the change of an employee from one position to another without a promotion or change to lower grade. According to the information provided, you were not reassigned. Rather, you were simply placed under another manager's supervision. Regarding the decision to place you on a new Performance Plan, we understand that it was changed so that your duties and responsibilities were consistent with the duties and responsibilities of your GS-11 Program Specialist position. In addition, a Performance Plan change was also implemented for other employees and there is no information evidencing that they engaged in a protected activity. We note that a Performance Plan describes the results that an employee should achieve during an appraisal period. In any event, Performance Plans are not considered personnel actions as required by the statute.

Because the performance plan simply explained how you would perform your duties, we cannot infer a significant change in duties and responsibilities occurred within the meaning of the statute. Regarding the letter of reprimand, given the fact your superiors advised you to provide your assessment to the Office of Inspector General; we do not believe they were motivated to retaliate against you for following their directions. Moreover, you indicated that no investigation was conducted into the problems you found and none of the officials responsible for the actions of concern to you have been disciplined or otherwise subjected to any adverse action because of the improprieties. Consequently, for the above reasons, we cannot conclude that your protected activity was a significant factor in the decision to take or not take the actions you complain about.

Thus, we have no basis for further inquiry into this part of your complaint as a possible violation of 5 U.S.C. § 2302(b)(9)(C).

You allege that the decisions to issue you a new Performance Plan on January 27, 2008, resulting in a significant change in duties and responsibilities, to issue you a letter of reprimand on February 6, 2008, and to reassign you constitute reprisal for refusing to obey an order, which would require you to violate a law. Title 5 U.S.C. § 2302(b)(9)(D) prohibits taking, or failing to take, or threatening to take, or failing to take, any personnel action against any employee for refusing to obey an order, which would require the employee to violate a law. The Board has determined that the elements of proof necessary to establish a case of a (b)(9)(D) violation are: (1) employee or applicant for employment participated in the protected activity defined in 5 U.S.C. § 2302(b)(9)(D); (2) the agency officials exercising personnel action authority had knowledge of the employee's or applicant's participation in the protected activity; and (3) participation in the protected activity was a significant factor in the personnel action or threat of a personnel action.

Based on our review of the information presented to this Office, however, we are also unable to conclude that a violation of section 2302(b)(9)(D) occurred. Specifically, in order for us to demonstrate a violation of section 2302(b)(9)(D), we would require information that shows that you were directed to disobey a law. However, while you state that your supervisor attempted to force you to certify certain grants, you have not provided any information to indicate that your supervisor or any other management official gave you a direct order that would require you to violate any specific law or that your supervisor took or failed to take the actions of concern to you because you failed to follow such an order. In the absence of information indicating that you were ordered to violate a law as required by the statute, we have no basis for further inquiry into the decision to management actions as possible violations of 5 U.S.C. § 2302(b)(9)(D).

Finally, regarding your request for this Office to seek a stay from the Board of the letter of reprimand. We do not petition the Board for a stay of every action alleged to be a prohibited personnel practice. A stay is a remedy that can be considered only after we have determined that there are reasonable grounds to believe that a prohibited personnel practice has been or is about to be committed. 5 U.S.C. § 1214. We have reviewed the information that you have submitted and that we have obtained upon further inquiry, but we are unable to find reasonable grounds to believe that the agency has taken any action as a result of a prohibited personnel practice. Thus, we have decided not to petition the Board for a stay at this time.

As indicated above, we have made a preliminary determination not to seek a stay and to close our inquiry into your allegations. However, before we actually close the file, we will give you an opportunity to submit any comments you may wish to make

concerning our determination. Your response must be in ***writing*** and should address each of the reasons we cited in reaching our preliminary determination to close your complaint. You have ***13 days*** from the date of this letter to submit your written response. If we do not receive any written comments from you by the end of the ***13-day*** period, we anticipate closing the file and will send you a letter terminating any further inquiry.

Sincerely,

J. Sandra Thomas
Complaints Examiner

AMICUS CURIAE BRIEF
WHISTLEWATCH.ORG
JANUARY 25, 2013 OSC LETTER RE: DEPARTMENT OF HEALTH AND HUMAN SERVICES NO FEAR ACT VIOLATION OF LAW, RULE, REGULATION

EXHIBIT B

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

January 25, 2013

Ms. Evelyn Brown

B6

Re: OSC File No. DI-12-3610

Dear Ms. Brown:

The Office of Special Counsel (OSC) has completed its review of the information you referred to the Disclosure Unit. You alleged that employees at the Department of Health and Human Services (HHS), Washington, D.C., are engaging in conduct that may constitute a violation of law, rule, or regulation, by failing to prepare and submit to Congress mandatory No FEAR Act Reports from at least January 2, 2002, until January 2, 2012.

The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c) and (g).

Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

We have concluded that there is a substantial likelihood that the information that you provided to OSC discloses a violation of law, rule, or regulation. Thus, we have transmitted the allegation that from the effective date of the No FEAR Act, October 1, 2003, until 2012, HHS has not submitted mandatory reports to Congress, to the Secretary of Health and Human Services for a report pursuant to 5 U.S.C. § 1213(c). With your consent, we identified you as the source of the information, so that a representative of the Secretary's office may speak with you directly.

We have provided the Secretary 60 days to conduct an investigation of these allegations and to report back to us. You should be aware, however, that these matters may take somewhat longer and agencies may request an extension of the reporting date. After we have reviewed the report, unless it is classified or otherwise not releasable by law, we will send you a copy and give you an opportunity to comment. The report and your comments will be transmitted to the President and the appropriate congressional oversight committees, and will be maintained by OSC in a public file, which is now online at www.osc.gov.

We emphasize that until the agency's final report is forwarded to the President and Congress, this remains an open matter under investigation. We will notify you when the report is available for public release.

Please contact me at (202) 254-3677 if you have any questions regarding this matter.

Sincerely,

Karen P. Gorman

Karen P. Gorman
Deputy Chief, Disclosure Unit

KPG/kpg

AMICUS CURIAE BRIEF
WHISTLEWATCH.ORG
14 PRINCIPLES OF ETHICAL CONDUCT

EXHIBIT C

Fourteen Principles of Ethical Conduct for Federal Employees

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

(2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

(3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

(4) An employee shall not, except as permitted by the Standards of Ethical Conduct, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

(5) Employees shall put forth honest effort in the performance of their duties.

(6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

(7) Employees shall not use public office for private gain.

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

(9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

(10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

(11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

(12) Employees shall satisfy in good faith their obligations as citizens, including all financial obligations, especially those -- such as Federal, State, or local taxes -- that are imposed by law.

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in the Standards of Ethical Conduct. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

Exhibit D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

BARBARA R. KING,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
DA-0752-09-0604-P-1

DATE: February 11, 2013

SUMMARY OF STATUS CONFERENCE

On February 6, 2013, I held a telephonic conference with the appellant, her representative, and the agency's representative. During the conference, the following matters were discussed.

PENDING MATTERS – I identified the two proceedings before the Board:(1) a motion for consequential damages, MSPB Docket No. DA-0752-0604-P-1; and (2) a motion for attorney fees, MSPB Docket No. DA-0752-0604-A-1.[1]

REPRESENTATIVES - The appellant confirmed that Joseph Bird is representing her in both of the pending proceedings. The agency's representative confirmed that Heather Masten, who had previously served as the agency's representative, has moved to another agency and she is no longer representing the agency in either of these proceedings.

SETTLEMENT – I encouraged the parties to explore settlement possibilities. I informed them that the Board retains the authority to enforce

[1] This summary relates only to the appellant's motion for damages.

compliance with a settlement agreement if it is made a part of the record, it appears that the agreement is legal on its face, it was freely reached by the parties, and they understand its terms. The parties will advise me if they want to participate in the Board's Mediation Appeals Program or if they want the assistance of a settlement judge.

ISSUES – The following issues are in dispute:

A. Whether the appellant is entitled to an award of consequential damages.

B. Whether the appellant is entitled to an award of compensatory damages.

C. If the appellant is entitled to such damages,what is the proper amount of damages to be awarded.

BURDEN OF PROOF – The appellant has the burden of proof on her claim for damages. She must prove both that she incurred the damages and that the damages were reasonable and foreseeable, *i.e.*, causally related to the agency's reprisal against her. *Johnston v. Department of the Treasury*, 100 M.S.P.R. 78, ¶ 13 (2005) (citing *Carson v. Department of Energy*, 92 M.S.P.R. 440, 447-48 (2002), *aff'd*, 64 F. App'x 234 (Fed. Cir. 2003)). At the time the agency's action occurred, the law provided that when the Board ordered corrective action pursuant to 5 U.S.C. § 1221(e), it could also order payment of back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. 5 U.S.C. § 1221(g)(1)(A)(ii).

Consequential damages under 5 U.S.C. § 1221(g) are limited to out-of-pocket costs and do not include non-pecuniary damages. The U.S. Court of Appeals for the Federal Circuit has found that Congress intended a narrow construction of 'consequential damages' and that the phrase 'any other reasonable and foreseeable consequential [damages]' should be read to cover only items similar in nature to the specific items listed in the statute, *i.e.*, back pay and related benefits, medical costs incurred, and travel expenses. These items are all actual monetary losses or out-of-pocket expenses. *See Bohac v. Department of*

Agriculture, 239 F.3d 1334, 1343 (Fed. Cir. 2001). The purpose of an award of consequential damages is to make the prevailing employee financially whole and non-pecuniary damages such as pain and suffering or emotional distress are not included.*Kinney v. Department of Agriculture*, 82 M.S.P.R. 338, ¶ 5 (1999). Further, consequential damages do not include compensation for an employee's own time spent pursuing her appeal, or reimbursement for leave (annual, sick or leave without pay) taken from work to pursue an appeal.*Bohac*, 239 F.3d at 1339-43.

In 2012, Congress amended the Whistleblower Protection Act (WPA) through passage of the Whistleblower Protection Enhancement Act of 2012 (WPEA), which was signed into law on November 27, 2012. Section 202 of the WPEA, entitled "Effective Date," provides as follows: "Except as otherwise provided in section 109, this Act shall take effect 30 days after the date of enactment of this Act." Section 109, states that its provisions, governing "Prohibited Personnel Practices Affecting the Transportation Security Administration" (TSA), "shall take effect on the date of enactment of this section." By operation of its express language, therefore, the Act's provisions related to TSA appeals became effective on November 27, 2012, while all other provisions became effective on December 27, 2012. The Act is silent regarding any retroactive operation of its terms.

The WPEA amended the provisions of the WPA relating to damages. Specifically, the amendments provide in relevant part:

> (g)(1)(A)If the Board orders corrective action under this section, such corrective action may include –
>
> ...
>
> (ii) back pay[2] and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential

[2] During the conference the appellant and her representative indicated that they do not believe the agency has fully complied with the Board's order to pay the appellant the appropriate amount of back pay, with interest and to adjust benefits with appropriate

> damages, and **compensatory damages** (including interest, reasonable expert witness fees, and costs).

5 U.S.C. § 1221(g)(1)(A) (emphasis added). The appellant's request for consequential and compensatory damages was filed after November 27, 2012, but prior to the effective date of the WPEA. Further, the appeal was decided under the provisions of the WPA rather than the WPEA. Thus, there is a question whether the new provisions of the WPEA relating to damages are retroactive so that compensatory damages may be awarded in this proceeding.

The U.S. Supreme Court considered the question of statutory retroactivity in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), a case that involved amendments to the Civil Rights Act of 1964 by the Civil Rights Act of 1991. The language at issue in *Landgraf* was similar to that used here: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." *Id.* at 257. The Court noted that such language does not, by itself, resolve the question. In resolving the question of retroactivity, the Court first addressed the need to reconcile the tension between generally applicable rules of statutory interpretation. Specifically,

> [T]he first is the rule that "a court is to apply the law in effect at the time it renders its decision," *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). The second is the axiom that "retroactivity is not favored in the law," and its interpretative corollary that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988).

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credits and deductions in accordance with the Office of Personnel Management's regulations. I indicated that, as a general rule, compliance matters are handled through a petition for enforcement. *See* 5 C.F.R. § 1201.181 (2012). Because the appellant's back pay and benefits are covered under the damages provision of 5 U.S.C. § 1221, I find that any dispute concerning the appellant's back pay and benefits may be adjudicated in this addendum proceeding.

Id. at 264. The Court set out a framework for determining whether a statute should be given retroactive effect. The Court stated that a tribunal must first determine whether Congress has expressly prescribed the statute's temporal reach. *Id.* at 280. If the new statute does not contain an express prescription, the tribunal must determine whether it would have actual "retroactive effect," that is, whether its provision "attaches new legal consequences to events completed before its enactment[,]" *id.* at 270, or would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280.The Court concluded that if retroactive application of the new statute would have the above-cited effects, it would apply the "traditional presumption" against retroactivity, "absent clear congressional intent favoring such a result." *Id.*;*see also Parker v. Office of Personnel Management*, 90 M.S.P.R. 480, 486 (2002).

The WPEA contains no express prescription of retroactivity and its legislative history concerning this issue is inconclusive. The version passed by the House of Representatives states that "[r]ights in this Act shall govern legal actions filed after its effective date," expressly declaiming any retroactive application. H.R. REP. NO. 112-508 at 12 (2012). By contrast, retroactivity is suggested by comments in the Senate's version, which provides in relevant part:

> This section states the Act would take effect 30 days after the date of enactment. The Committee expects and intendsthat **the Act's provisions shall be applied in OSC, MSPB, and judicial proceedings initiated by or on behalf of a whistleblower and pending on or after that effective date.** Such application is expected and appropriate because the legislation generally corrects erroneous decisions by the MSPB and the courts; removes and compensates for burdens that were wrongfully imposed on individual whistleblowers exercising their rights in the public interest; and improves the rules of administrative and judicial procedure and jurisdiction applicable to the vindication of whistleblowers' rights.

S. REP. NO. 112-155, at 52 (2012) (emphasis added).

The language in the Senate Report is a legislative precursor of the actual Act, but it is contradicted on the point of retroactivity by the express terms of the House of Representative's legislative version. The Court noted in *Landgraf*, "[s]tatutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal." *Landgraf*, 511 U.S. at 286.[3] Given the ambiguous legislative history, and the absence of express language in the WPEA itself, I find that the act does not evidence clear Congressional intent in favor of retroactivity. I, further, find that in adding the availability of compensatory damages, the WPEA attached new legal consequences to events completed before its enactment.Further, the expansion of damages to include compensatory damages involves a waiver of sovereign immunity and the United States Supreme Court has held that a waiver of sovereign immunity must be unequivocally expressed in statutory text and a waiver of such immunity will be strictly construed in favor of the sovereign. *Lane v. Pena*, 518, 187, 192 (1996). Upon consideration, Congress has waived sovereign immunity with regard to compensatory damages to be awarded in 5 U.S.C. § 1221(g)(1)(A)(ii), but Congress did not express whether that provision was to apply to cases pending on the date the statute became effective. Accordingly, I conclude that its application to pending cases would have actual retroactive effect, as defined by the Court in *Landgraf*, and that therefore the presumption against statutory retroactivity

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[3] The WPEA expressly provides that its provisions take effect 30 days after the date of enactment, except for TSA cases, which are governed by the WPEA immediately upon enactment. If Congress intended the WPEA to apply retroactively to all pending appeals, there was seemingly no reason to include a separate provision making it effective in TSA cases 30 days sooner than other cases. *See Special Counsel v. Wilkinson*, 104 M.S.P.R. 253, 261 (2006)("'A cardinal principle of statutory construction" [provides] that 'a statute ought, on the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'")(quoting *TRW, Inc. V. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed2d 339 (2001)).

applies in this case. *See Caddell v. Department of Justice*, 96 F.3d 1367, 1371 (Fed.Cir. 1996)(1994 amendment to the WPA, which included decision to order psychiatric testing as a personnel action, enlarged conduct subject to WPA, and would have retroactive effect if applied to conduct occurring prior to effective date of amendment; in the absence of express legislative intent, presumption against statutory retroactivity therefore barred application of amended version of WPA in pending case).

This ruling regarding the retroactive applicability of the WPEA is subject to certification for interlocutory review by the Board, upon my own motion, or the motion of either party. 5 C.F.R. § 1201.91 (2012). Such an interlocutory appeal is appropriate for review of a ruling involving "an important question of law or policy about which there is substantial ground for difference of opinion[,]" and where "[a]n immediate ruling will materially advance the completion of the proceeding...." 5 C.F.R. § 1201.92 (a), (b). I find the question of whether the provisions of the WPEA with regard to damages may be applied retroactively to pending cases involving conduct occurring prior to its effective date is appropriate for review under the criteria set forth under 5 C.F.R. § 1201.92.[4] Accordingly, it appears to be appropriate to certify this issue for interlocutory appeal. If either party objects to such an interlocutory appeal, I must receive such objection no later than February 20, 2013. If an interlocutory appeal is certified, all further proceedings on the appellant's motion for damages will be stayed while the interlocutory appeal is pending before the Board. *See* 5 C.F.R. § 1201.93(c).

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[4] The parties are advised that an interlocutory appeal is currently pending before the Board concerning the retroactivity of the WPEA's provisions concerning covered disclosures. Further, the Board has announced an opportunity to file amicus briefs on that issue. *See* 78 Fed. Reg. 9431 (Feb. 8, 2013).

If either party disagrees with this Summary, I must receive a written objection or motion to supplement this Summary no later than February 15, 2013.

FOR THE BOARD: ___/S/_____
Marie A. Malouf
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail — Barbara R. King

[redacted] B6

Appellant Representative

Electronic Mail — Joseph Bird, Esq.
136 South Pontiac Trail Suite 2
Walled Lake, MI 48390

Agency Representative

U.S. Mail — Maj. Lawrence Lynch
Department of the Air Force
AFLOA/JACL TX LLFSC
1 Washington Circle, Ste. 10
Randolph AFB, TX 78151-4564

February 11, 2013
(Date)

/s/
Crystal Q. Wilson
Paralegal Specialist